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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. **949** 51

LONNIE E. SMITH,

Petitioner,

vs.


S. E. ALLWRIGHT, Election Judge, and JAMES J.
LIUZZA, Associate Election Judge, 48th Precinct of
Harris County, Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS, 
New York,
Counsel.

Of Counsel:

GEORGE CLIFTON EDWARDS,
Dallas, Texas.

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SUPREME COURT OF THE UNITED STATES

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LONNIE E. SMITH,

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S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA, Associate Election Judge, 4th Precinct of Harris County, Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioner to the filing of this brief has been obtained. Attorney for the respondents has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

May 3, 1943.

ARTHUR GARFIELD HAYS,
Counsel for

American Civil Liberties Union,
Amicus Curiae.

GEORGE CLIFTON EDWARDS,
Of Counsel.

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BRIEF OF AMICUS CURIAE

I

The American Civil Liberties Union is a nation-wide organization devoted to the protection and enforcement of those great liberties preserved for us in our Constitution and our Bill of Rights. We believe that these liberties belong to us just so long as our country remains a democracy. And it is now an axiom that a democracy depends upon and functions through the ballot. For this reason any arbitrary and discriminatory restriction on the use of the ballot, particularly where it is based on

race, color, or creed, causes us to view such action with alarm as an impediment to the democratic process.

It is in this light that we have considered the resolution adopted by the Democratic Party in Texas on May 4, 1932 by which only white citizens of Texas were made eligible for membership in the party and hence entitled to vote in its primaries.

II

This case presents a simple question: Is the right to vote in the Texas Democratic primary a right granted by the United States Constitution?

In relying upon *Grovey v. Townsend*, 295 U. S. 45, the District Court confused the issue. The *Grovey* decision, based upon the 14th and 15th Amendments, was not concerned with the question of what affirmative rights are conferred by the Constitution, whether the Constitution guarantees a participation in a primary. Rather the *Grovey* case centered on a determination of the source of the discrimination, whether state action prevented voting in the primary. Directly in point here is *U. S. v. Classic*, 313 U. S. 299, which, mentioning neither *Grovey v. Townsend*, *supra*, nor (except to distinguish them, 313 U. S., at 315, 329), the 14th and 15th Amendments, held that the privilege of casting a vote in the Louisiana Democratic primary was a right bestowed by Article I, Sections 2 and 4 of the Constitution.* In this holding, all the justices concurred, for the dissent's only objection was to the interpretation of the Federal statute under which the prosecution was brought. In the present case

* Since Article I, Section 2 grants the right to vote for Congressional representatives, the parallel phraseology of Amendment 17 grants the same right in elections of United States Senators.

no issue of the agency enforcing the denial of the voting right is presented. Plaintiff, asking a declaratory judgment and damages for the deprivation of a right, requests merely that the Court repeat the *Classic* case's declaration of his constitutional right to vote in the Democratic primary. His claim for damages is sustained by the civil counterpart (U.S.C. Title 8, Section 43) of the Criminal Statute enforced in the *Classic* case (U.S.C. Title 18, Section 52). *Hague v. Committee for Industrial Organization; et al.*, 307 U. S. 496. Congress, in those sections, extended its active protection to the right granted by Article 1 and Amendment 17.*

United States v. Classic, *supra*, emphasizes that Article I of the Constitution must be read not in terms of methods of election in 1783 but "as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of the Government." Hence, the phases of the suffrage process encompassed today in the right to vote must be determined from the practical approach. The present Chief Justice, in his opinion, delved into the details of the Louisiana primary set-up to fortify his conclusion that in practical effect, the Louisiana Democratic primary was the main part of the election; hence amply included within the right to vote guaranteed by Article I, Section 2. However, the decision may be interpreted as setting up two categories, both of which are subject to Article I, Section 2. In addition to those primaries which from a realistic point of view elect the Congressman, a separate class would cover those states where the law necessitates a primary.

"Where the state law has made the primary an integral part of the procedure of choice, or where

* It is conceded that Sections 51 and 52, Title 18, of the United States Code do not enlarge or amplify any rights secured by Article 1, *Newberry v. U. S.*, 256 U. S. 232, and by implication the 17th Amendment.

in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, sec. 2. * * * Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative." *U. S. v. Classic*, 313 U. S. 299, at pp. 318-19.*

The situation in Texas meets both interpretations in the *Classic* case and both categories of the latter interpretation. It is well-known and accepted that nomination in the Democratic primary in Texas is tantamount to election. That the citizens of Texas themselves consider the Democratic primary the real election is evidenced by the reversal of the normal relationship between the total vote polled in primary and the total in the general election. In the non-presidential years, approximately three-quarters more votes were cast for Federal office in the Democratic primaries than were cast for Republican, Democratic and all other candidates together in the general election.**

* Attorney General Biddle has interpreted the *Classic* decision in like manner: "The decision also holds that the right of qualified electors to vote at the primary is an aspect of the right to choose representatives conferred by Article I, Section 2—and thus a right secured by the Constitution—if either of two conditions is met (a) if, under the governing state law, the primary is an 'integral part' of the electoral process; or (b) if, as a matter of fact, the primary is decisive of the ultimate election: Precisely the same result would follow in senatorial primaries under the 17th Amendment. On these points I do not understand that any of the justices disagree." 10 U. S. Law Week 2283 (1941).

** For example, in the 1930 Senatorial election, 651,619 votes were cast in the Democratic primary, while the total vote in the general election was 306,701; in 1934, 662,487 votes were cast in the Democratic primary while 454,408 were cast in the general election. (R 31-32).

The alternative test that the primary be an "integral part" of the election is likewise satisfied. Texas law makes mandatory that the Democratic party nominate by primary.* Furthermore the state regulations on the actual procedure of the primary are followed (R. 121). The failure to obtain all the expenses of the primary from the state's treasury, a fact emphasized by the District Court, in no way detracts from the conclusion that Texas has made the Democratic primary an integral part of the election. *Nixon v. Condon*, 286 U. S. 73.

It seems clear, therefore, that the right to vote in a primary of the kind extant in Texas is a right granted and protected by the Constitution of the United States.

The right to vote, along with the right to speak, meet, write, and worship freely, is the essence of American Democracy. Upon the judiciary rests the duty of countermanding all attempts, whether by direct act or by subterfuge, to destroy this right.

CONCLUSION

It is respectfully submitted that this Court grant the petition for the writ of certiorari prayed for.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS, *Counsel.*

Of Counsel:

GEORGE CLIFTON EDWARDS.

* All parties polling 100,000 votes or more in the last general election must hold primaries. The Democratic party always comes within the 100,000 or more bracket. Article 3101, Revised Civil Statutes of Texas, 1925.